(20) (10)

Nos. 87-470 and 87-614

Supreme Court, U.S.
FILED
JUL 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, et al.,

Respondents.

No. 87-614

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,

Petitioners,

vs.

STATE OF INDIANA,

Respondent.

On Petitions For Writs Of Certiorari To The Supreme Court And Court Of Appeals Of The State Of Indiana

BRIEF AMICUS CURIAE OF BOB CORBIN AS ATTORNEY GENERAL OF THE STATE OF ARIZONA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

Bob Corbin is the duly elected Attorney General of the State of Arizona. As Amicus herein, he has a fervent interest in the outcome of this case. He seeks guiding rules of law to enable himself and other prosecutors in Arizona to constitutionally enforce the Arizona RICO statutes, A.R.S. § 13-2301 et seq., in conjunction with Arizona's felony obscenity statutes, A.R.S. § 13-3501 et seq.

The application of Arizona's RICO laws to obscenity is the subject of State v. Feld, 155 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987), cert. denied, ____, U.S.___, 99 L.Ed.2d 482 (3-28-88), which is now pending in the Superior Court of Maricopa County and may be directly affected by this Court's disposition of the instant Indiana

cases. Like Indiana and the several other states with racketeering statutes which include obscenity offenses as predicate crimes, Arizona patterned the organized crime laws upon the federal RICO statutes, 18 U.S.C. § 1961 et seq.

Due to the gross misrepresentations of law and fact contained in the Petitions for writs of certiorari and the briefs for Petitioners herein, your Amicus desires to submit his position on the Scope and Standard of Review and the Constitutionality of Remedies involved in this review of the Indiana cases, its RICO/CRRA statutes, and the Opinion of its Supreme Court and Court of Appeals.

SUMMARY OF ARGUMENT

I. SCOPE AND STANDARD OF REVIEW

The Indiana racketeering statutes are not facially unconstitutional under the test of Watson v. Buck, and are capable of constitutional application to the predicate offense of obscenity. As applied in the Indiana Supreme Court cases below, the civil forfeitures were limited to preservation of assets for a brief period until a prompt trial could have been held. In the criminal case from the Indiana Court of Appeals, the only remedy sought was conviction for the racketeering acts of distributing obscenity. These cases all involve hard-core pornography and no other application of RICO laws is before the Court.

II. CONSTITUTIONALITY OF REMEDIES

The facts before the Court show these cases to be consistent with other criminal and civil applications of RICO laws to other predicate offenses. These cases are still in their pre-trial stages and further construction and fact finding would have been necessary to decide on appropriate remedies to be granted to the State of Indiana. Any hypothetical applications which could be considered overbroad or vague are not before the Court and were not sanctioned by the Indiana Supreme Court and Court of Appeals. Other federal and state obscenity and RICO cases would have guided and limited the application of the RICO remedies below, and the First Amendment nature of obscenity cases does not preclude the progress of fashioning a remedy for obscenity offenses under

RICO. Due Process is well established in these cases and the state courts must be presumed to be willing and ready to follow such precedent.

Assets of businesses corrupted by obscenity should be subject to forfeiture and restraining orders, since a racketeering enterprise is merely a tool of the crime and a conduit or depository of ill-gotten gains which should be reformed under RICO. When applied by the courts, as was done below, RICO laws can effectively punish the obscenity offenders and their property without unreasonable restraint or chill on legitimate expression. The only logical chill to be expected would be for other businesses to cease traffic in the types of illegal materials found obscene and a predicate to these RICO actions. Since these all involve hard-core pornography, the only chill

could be against the same or similar materials and this would be a reasonable result. No such chill has yet occurred, but the law is entitled to have such a reaction in order to obtain compliance with valid obscenity laws in the face of a major law enforcement problem.

LAW AND ARGUMENT

I. SCOPE AND STANDARD OF REVIEW: THE INDIANA RACKETEERING STATUTES ARE FACIALLY CONSTITUTIONAL AND SHOULD NOT BE INVALIDATED UNDER THE CIRCUMSTANCES PRESENT IN THESE CASES.

A. The Indiana Racketeering Statutes Under Review Must Be Evaluated In Light Of The Opinion Of The Indiana Supreme Court As Applied To Facts Proven Below And Not On Hypothetical Exaggerations.

Many years ago, this Court announced a rule of deferring to state courts the interpretation of state statutes. Watson v. Buck, 313 U.S. 387, 401-02 (1941). The one exception to this wise rule, so much ignored in present-day actions under 42 U.S.C. § 1983 (See Appendix A), was set out at 402:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in

> every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Supreme Court of Indiana, and the Court of Appeals of Indiana, reviewed these cases in light of the First Amendment to the U.S. Constitution to determine whether the "statutes constitute facially unconstitutional prior restraints in their application to the predicate offenses of obscenity". 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 560 (Ind. 1987). State v. Sappenfield, 505 N.E.2d 504, 506 (Ind. App. 1987)[1] Petitioners disagree with the conclusion of the Indiana courts that the RICO/CRRA[2] statutes do not violate

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[1] Hereinafter referred to as "4447 Corp." and "Sappenfield".

[2] "RICO/CRRA" refer to Indiana's 1980 Racketeer Influenced and Corrupt Organizations Act (Ind.Code § 35-45-6-1 et seq.) and Civil Remedies for Racketeering Activity statute (Ind.Code § 34-4-30.5-1 et seq.).

the U.S. Constitution, but it is untrue that the state courts below found the statutes "immune from First Amendment scrutiny". Brief for Petitioner Fort Wayne Books, Inc., at 22; [3] Brief for Petitioners (Sappenfield, et al.), at 15-16.[4] This was but the first of the many exaggerations of law and fact proposed by Petitioners in their briefs. Others border on the hysterical and absurd. This Court, however, cannot review these cases so capriciously. The Supreme Court of Indiana gave an authoritative construction to these laws and remanded the cases for trial, further hearings, and further applications to the facts to

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[3] Hereinafter referred to as "Fort Wayne Brief".

[4] Hereinafter referred to as "Sappenfield Brief".

be later proven in the trial courts. As stated in 4447 Corp., at 566-567:

> The Marion Circuit Court entered its ex parte seizure order upon a showing of probable cause to believe a violation of the RICO statute involving the property in question had occurred. As we construe the RICO statute, a showing of prior convictions for the alleged obscenity violations was not required. In order to prevail in the forfeiture action, appellee Goldsmith will of course have to show the existence of the obscenity violations in order to prove a violation of Ind.Code § 35-45-6-2 has occurred. It is at trial on the forfeiture and other requested CRRA remedies that the question of whether the materials are obscene will be litigated. A final determination of that question was not necessary at the hearing on the petition for seizure. [Id. at 566.]
>
> * * *
>
> At the point a seizure order is entered there has been a judicial determination that there is probable cause to believe violation of Ind.Code § 35-45-6-2 involving the property has occurred. The reason for an adversary

hearing on the seizure of the property would be to determine whether the property had been unlawfully seized. Generally, a defendant would initiate such action by the filing of a motion to vacate the seizure order, as was done in the instant cases, and we would expect the court to hold a prompt adversarial hearing on such a motion. If no motion to vacate is filed, or if the motion is denied, there will be a full adversarial hearing on the merits of the forfeiture action. Although Ind.Code § 34-4-30.5-3(a) does not specifically provide a time frame for that hearing, we would interpret the statute to require the hearing on the question of forfeiture to be held within a reasonable time.

Thus a defendant whose property has been seized pursuant to Ind.Code § 34-4-30.5-3(b) is afforded due process by a prompt adversarial hearing on a motion to vacate the seizure order and/or by a hearing on the question of forfeiture held within a reasonable time after the CRRA complaint and petition for seizure have been filed. In the instant case, appellants were afforded a hearing on their motions to dismiss the complaints and to vacate the seizure orders. Because the proceedings were

> halted by the filing of the interlocutory appeals, there has been no opportunity for trials on the merits of the CRRA complaints. At this stage we can discern no violation of appellants' due process rights.
>
> Transfer is granted and the opinion of the Court of Appeals is vacated. The causes are remanded for further proceedings not inconsistent with this opinion. [Id. at 567.]

B. The Operation And Effect Of The Indiana Racketeering Statutes, When Involving The Predicate Offense Of Obscenity, Has Been Given Limiting Construction By The Courts Below To Avoid Unconstitutional Applications.

The granting of the Petitions for writs of certiorari in these cases, 99 L.Ed.2d 268, may have been improvident, for want of jurisdiction as not final judgments within 28 U.S.C. § 1257, Flynt v. Ohio, 451 U.S. 619 (1981). Nevertheless, this Court is still bound by the interpretations placed on the state laws by the courts below (and by further

constructions that could and would take place in the "future proceedings" in the trial court and on re-appeal), and this Court must review the Indiana RICO/CRRA statutes as if originally written in the way construed. Guaranty Trust v. Blodgett, 287 U.S. 509, 513 (1933); Kingsley Pictures v. Regents, 360 U.S. 684, 688 (1959); Mishkin v. New York, 383 U.S. 502, 507-08, 510-11 (1966); U.S. v. 37-Photographs, 402 U.S. 363, 369-73 (1971); Ward v. Illinois, 431 U.S. 767, 772-73, 776 (1977); Metromedia v. San Diego, 453 490, n.26 (1981); Brockett v. Spokane Arcades, 472 U.S. 491 (1985) ("Brockett II").

In so doing, the "substantial overbreadth doctrine" applies. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-95, n.5 (1982); New York v. Ferber, 458 U.S.

747, 772 (1982); Brockett II, supra at 503-04, n.12 (1985).

Amicus submits that obscenity statutes are not "pure speech" regulations, as are political or religious dialog or verbal expression cases. As held in People v. Souter, 178 Cal.Rptr. 111 (Ct. App. Cal. 1981), paying actors and actresses to engage in explicit sex acts before a camera in order to produce pornography is a violation of prostitution and pimping statutes. See also: People v. Fixler, 56 Cal. App.3d 321, 128 Cal. Rptr. 363 (1976); People, ex rel. Van De Kamp v. American Art Enterprises, 75 Cal. App.3d 523, 142 Cal. Rptr. 338 (1977); People v. Kovner, 409 N.Y.S.2d 349 (N.Y. Cty., Sup.Ct., 1978); People, ex rel. Van De Kamp v. American Art Enterprises, 177 Cal. Rptr. 776 (Cal. App. 1981); State, ex rel. Sensenbrenner v. Adult Book Store, 26

Ohio App.2d 183, 271 N.E.2d 13 (Franklin County, 1971), aff'd 35 Ohio St.2d 220 (1973), cert. denied 421 U.S. 934 (1975). The distribution of such hard-core pornography is therefore exploiting the work of prostitutes, and is at least a mixture of conduct and speech. Modern hard-core pornography should not be elevated to the protected class which political, and religious expression deserves. In the obscenity law area, the rule of substantial overbreadth should apply, as stated in Watson v. Buck, supra at 402, and as this Court stated in Hoffman Estates, 455 U.S., at 494-95, Footnote 5:

> 5. A "facial" challenge, in this context, means a claim that the law is "invalid in toto--and therefore incapable of any valid application."

Corollary to this are the rules ("wait until it's time to look" and "look only at what's before you")

discussed and followed in Brockett II, at 501-02:

> We call to mind two of the cardinal rules governing the federal courts: "'[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" United States v. Raines..., quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration... Citing a long line of cases, Raines also held that "[k]indred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

Amicus urges the Court to keep these principles at the forefront of this review. The Petitioners and the Amicus in their support argue this case as a picture of Armageddon, but it is

presented through the looking glass. Other state courts and legislatures nationwide are watching and we also deserve the reasonable review to which the Supreme Court of Indiana is entitled.

II. CONSTITUTIONALITY OF REMEDIES: UNDER THE CIRCUMSTANCES PROVEN TO THE COURTS BELOW, THE INDIANA RICO/CRRA STATUTES WERE APPLIED CONSTITUTIONALLY TO THE PRESENT POINT IN THESE CASES AND DUE PROCESS MUST BE EXPECTED TO CONTINUE.

The facts proven and presented to the courts below are set out in the Indiana Supreme Court opinion, 504 N.E.2d at 561-63, and in the Indiana Court of Appeals opinion, 479 N.E.2d at 580-83. They show that this case is still at the pre-trial stage where motions are pending by the State for temporary seizure of assets and by the

Defendants to modify or vacate the seizure orders.

In Indianapolis, based on a Complaint and Affidavits which seek to prove the obscenity predicates within the civil trial, the Trial Court ordered the two operating stores to preserve the status quo by listing their property and securing their business equipment. The third, yet unopened, store was ordered sealed until the trial, which was set for 72 hours after the temporary restraining orders were signed. The two open stores continued to operate and sell their hard-core pornographic materials. Thereafter, motions by Defendants delayed the trial and the resolution of pre-trial issues and resulted in this interlocutory appeal by the Defendants at their request. The Court of Appeals stayed the padlock order on the assets of the third store,

as well as the inventory and restraining order on the other two stores, so there was no pending Trial Court order restraining Defendants in Indianapolis when the matter was heard in the Indiana Court of Appeals and Supreme Court. The Indianapolis Defendants, 4447 Corporation, et al., abandoned their appeal after the Indiana Supreme Court decision and have not petitioned this Court for review, but further proceedings would be bound by the decision of this Court and any further mandate of the Indiana Supreme Court thereafter.

In Fort Wayne, the civil Complaint showed 39 criminal convictions at three stores to establish the predicate illegal activity and the Trial Court ordered assets seized pending disposition. After Defendants' motions to vacate or modify the orders

were heard and denied, the police seized the assets. After the Trial Court denied a second set of motions for return, Defendants sought and received an interlocutory appeal so their cases could be consolidated with the pre-trial appeal from Indianapolis that was then pending in the Court of Appeals. One year later, but before it released its opinion, the Court of Appeals granted a stay in the Fort Wayne cases and the stores were allowed to re-open. Therefore, there were no restrictions on the Fort Wayne stores at the time the Court of Appeals ruled and the cases went to the Indiana Supreme Court. This remains the status of these cases to this day.

The companion cases of Ronald and Connie Sappenfield and the Fantasy One and Two stores are purely criminal RICO informations alleging the RICO offenses

and the predicates of obscenity law violations to be proven at the criminal trial or trials. After the Court of Appeals (Fourth District) ruled the RICO/CRRA statutes inapplicable to obscenity offenses (in 4447 Corp. v. Goldsmith, 479 N.E.2d 578 (Ind. App. 4th Dist. 1985)), the Trial Court dismissed the RICO charges and the State appealed to the Indiana Court of Appeals (First District), which reversed after the decision of the Indiana Supreme Court (in 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987). State v. Sappenfield, 505 N.E.2d 504 (Ind. App. 1st Dist. 1987)). No asset seizures were sought or ordered in those cases.

Being the first uses of Indiana's RICO/CRRA statutes in obscenity crime contexts, these cases necessarily required careful attention from the Trial Courts involved. The trial in the

Indianapolis case had been set for 72 hours after the Complaint was filed, and the Fort Wayne case was delayed by defense motions so no trial date could be set. Although Petitioners, Fort Wayne Books, Inc. and the Sappenfields and Fantasy stores, make hypothetical assertions about the effect of the pre-trial orders in the Fort Wayne and Indianapolis civil cases, and the very filing of the criminal charges in No. 87-614, the cases must be limited to their posture and the facts presented below. These cases all involve so-called "adult bookstores" that sell nothing but hard-core pornography. These are not legitimate theaters showing "Hollywood" movies rated "PG" or "R", not general public bookstores like B.Dalton or Waldenbooks selling cookbooks, fiction, sports, reference, etc., and not chains of stores with

mixed goods like food, sundries, and magazines or films, like convenience and grocery stores. A review of the civil pleadings, affidavits, and criminal information shows these businesses engaging solely in pictorial materials of explicit sex acts.

The State prosecutors asked for several RICO and CRRA remedies in the civil cases and only for criminal penalties upon conviction in the criminal case. Whether any of these remedies, or any others, would have been granted would depend on the proof and disposition at trial and on further construction of the statutes and evaluation of applicable remedies by the Trial Courts below, had the cases proceeded either before or after the Indiana Supreme Court ruled.

This Court would normally reserve ruling on pre-trial issues, Flynt v. Ohio, supra, but it must also be remembered that the Trial Courts would have followed the Indiana Supreme Court decision on the issues decided in 4447 Corp. The Trial Courts would further have to consider the other issues, arguments, and precedents for remedies and procedures not covered by 4447 Corp.

In both Fort Wayne and Indianapolis, only one pre-trial ex parte order was issued, for temporary asset seizure, yet the Trial Courts devoted significant effort to the resolution of motions on several novel and complicated issues before the appeals were certified. None of the other remedies prayed for (affecting licenses, other assets, business continuation, etc.) were reached at those pre-trial stages.

Trial courts must continue to interpret, limit, construe, and apply the procedures and remedies to the specific facts, in light of the special First Amendment considerations attending every obscenity-related case. As an example, the stages of trial court resolution of proof, guilt, punishment, forfeiture, and procedure issues by the U.S. District Court in the first federal obscenity RICO action is illustrative. See the several decisions of the Eastern District of Virginia in United States v. Pryba, et al., 674 F.Supp. 1502 (Oct. 8, 1987) (re: conflict of counsel); 674 F.Supp. 1504 (Nov. 3, 1987) (constitutionality of RICO in obscenity cases, forfeiture, prior restraint, punishment, due process, ex post facto) (cited in Fort Wayne Brief at 25); 674 F.Supp. 1518 (Nov. 18, 1987) (standard of proof, proof of obscenity); Order of

Forfeiture, Order of Nov. 18, 1987 (unreported) (copy in Brief for Petitioner Fort Wayne Books (Fort Wayne Brief), Appendix B, App. 9) (post-trial forfeiture Order of related assets upon jury verdict, rights of innocent third parties); 678 F.Supp. 1218 (Jan. 20, 1988) (motion for acquittal, sufficiency of evidence); 678 F.Supp. 1225 (Jan. 29 and Feb. 12, 1988) (inadmissibility of certain polls, community standards of "acceptance" vs. "tolerance" or availability); 680 F.Supp. 790 (Mar. 8, 1988) (state obscenity conviction admissible).

A similar process was begun in these cases. The Indiana courts cannot be presumed to have intended to refuse to consider prior restraint and due process issues as the cases proceeded. As in Pryba, the remedies to be applied below would be limited to the special

circumstances presented in each case. The stores in Fort Wayne and Indianapolis were all devoted to hard-core pornography and the Trial Courts should have found, as they did, that their assets needed to be preserved while the determinations of liability and forfeiture were determined as soon as possible.

A. The RICO/CRRA Remedies Of Closure And Forfeiture May Constitutionally Be Applied To Business Enterprises Which Have Been Corrupted By Violations Of Obscenity Statutes As Well As To Businesses Corrupted By Other Predicate Crimes.

The State in each of the civil cases below assumed the burden of proving the illegal obscenity predicates, and the restraining-seizure orders were intended to preserve the assets only for the brief period until the prompt trial could have been held.

Therefore, the requirements for due process were met as set out by the Court in Southeastern Promotions v. Conrad, 420 U.S. 546, at 560 (1975).

As pointed out by the Indiana Supreme Court in 4447 Corp. at 564, and by the Court of Appeals in Sappenfield at 505, the RICO acts are designed as strong medicine against the epidemic of organized crime involvement in the hard-core pornography racket, as they are in other activities of organized crime. See also: Russello v. U.S., 464 U.S. 16, 26-28 (1983). The central theory of RICO is that the corruption of a business through crime, whether drugs, prostitution, arson, or obscenity, make that enterprise subject to treatment as an unlawful depository of economic interests. Once corrupted, such an enterprise may be treated as having assets subject to forfeiture to prevent

unjust enrichment from contraband. See: U.S. v. 37 Photographs, 402 U.S. 363, 376-77 (1977). In this regard, the pre-trial seizure and restraining orders in Fort Wayne (and Indianapolis) were consistent with other orders to preserve assets pendente lite, even though final forfeiture cannot attach until after verdict and proof of the related nature of each asset to the crimes proven. See: U.S. v. Ginsburg, 773 F.2d 798, 800-03 (7th Cir. 1985), U.S. v. Roberts, 749 F.2d 404, 409-10 (7th Cir. 1984); U.S. v. Lizza Indust., 775 F.2d 492, 497-99 (2nd Cir. 1985); U.S. v. Zielie, 734 F.2d 1447, 1458-59, 1462-63 (11th Cir. 1984); U.S. v. McManigal, 708 F.2d 276, 283-90 (7th Cir. 1983); U.S. v. Martino, 681 F.2d 952, 954-59 (5th Cir. 1982); U.S. v. Godoy, 678 F.2d 84, 86-88 (9th Cir. 1982).

Such pre-trial seizures or restraining orders against assets, of whatever kind, differ from nuisance abatement actions where the only element of the nuisance is the sale of obscene items. RICO acts require additional elements of proving the enterprise, the illegal use of the enterprise to profit from criminal activity, and the relation back of the assets to the racketeering. A business is not "closed" because of past sales of obscenity, as in State, ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Id. 1983), juris. noted at 454 U.S. 1140, app. dismissed by U.S. Marketing (over the State of Idaho's objection to the Clerk of this Court) at 455 U.S.1009 (contrary to the assertion in Avenue Book Store v. Tallmadge, 459 U.S. 997 (1982) (Justice White dissenting) that it was "by stipulation"), but is merely - subject to orders preserving

jurisdiction over assets for a brief period until the trial court can determine the propriety of forfeiture of illegal proceeds of racketeering. Although the final closure in nuisance actions is proper, as in Kidwell, supra, without offending Vance v. Universal Amusements, 445 U.S 308 (1980), other final remedies are also possible within constitutional limits, as in Tallmadge, supra (enjoining future sales of "obscenity") or State, ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (1974), appeal dismissed f.w.o.s.f.q. 421 U.S. 923 (1975). See also: Spokane Arcades v. Brockett, (Brockett I), 631 F.2d 135, at 139 (9th Cir. 1980), aff'd. 454 U.S. 1022 (1981).

How an enterprise is proven to have been corrupted is unrelated to what type of enterprise it is. 4447 Corp. at 565. The aim of the statutes is to prevent

criminals from intentionally using a business scheme to make, launder, or dispense proceeds of illegal acts and to punish such unfair business practices by divestment of such poison fruit. See: U.S. v. Th[illegible], 474 F.Supp. 134 (N.D. Ga. 1979); U.S. v. Conner, 752 F.2d 566, 575-78 (11th Cir. 1985); U.S. v. Cauble, 706 F.2d 1322, 1345-49 (5th Cir. 1983); U.S. v. Martino, supra at 960-61; U.S. v. Grande, 620 F.2d 1026, 1037-39 (4th Cir. 1980); U.S. v. Huber, 603 F.2d 387, 392-97 (2nd Cir. 1979). Trial courts require flexibility to avoid constitutional problems yet preserve the power to apply effective sanctions in appropriate cases. U.S. v. Busher, 817 F.2d 1409, 1413-16 (9th Cir. 1987). State and federal law enforcement needs the RICO laws to deal with the controlling parts of the hard-core obscenity industry and "must

be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems". Young v. American Mini Theatres, 427 U.S. 50, 71 (1976).

The existence of the many decisions, limiting and shaping the RICO remedies to provide a firm fairness in individual situations, strengthens the constitutionality of the state and federal laws in the obscenity area. The state courts will be guided by these principles and fashion remedies in ways that are as consistent as possible. These trial court decisions will then be reviewed on appeal to further guarantee their propriety. The non-final orders and proceedings in the Indiana courts below should have an opportunity to develop under the facts of each case and further add to the law of RICO as applied to obscenity. The complexity of this task is more reason to let the

state courts develop these issues rather than a reason to interfere. Moore v. Sims, 442 U.S. 415, 427, 429-30 (1979).

The hypothetical grounds presented by Petitioners herein require this Court to presume unconstitutional interpretations by the Indiana courts. This was the error of the Ninth Circuit in Brockett v. Spokane Arcades (Brockett II), 472 U.S. 491 (1985), and this Court correctly ruled that the first inquiry should be whether the statute would receive an invalid interpretation or application in the trial courts and if so to declare such use improper and only enjoin such use, or excise such provision, if an unlawful use is the only probable or possible use forseeable. If a reviewing court cannot say that a trial court will violate the constitution, it must presume due process will be afforded and allow the

cases to proceed. If the court finds that the trial court will or could make unconstitutional applications then the correct interpretation should be declared and presumed to be honored. McCarthy v. Briscoe, 553 F.2d 1005, 1007 (5th Cir. 1977). Only if an invalid use is unavoidable, such as with a wholly unsavable statute under the Watson v. Buck test or a grievous fact situation as in Dombrowski v. Pfister, 380 U.S 479 (1965), should the reviewing court sever part of the law, or engage in partial invalidation, or enjoin or forbid certain applications. Brockett II, supra at 502-05. This is especially pertinent in pre-trial proceedings. Flynt v. Ohio, supra at 622.

A common thread in the Brief for Petitioner Fort Wayne Books is the exaggerated reach or possible reach of RICO and its enormous chilling effect.

In the Fort Wayne Brief at 13 and 23-24, the assertion is voiced that the Indiana Supreme Court sanctioned the closure of all stores in a chain if two copies of any item are found obscene. The state Supreme Court's opinion in 4447 Corp. at 564 and 566-67, reads otherwise and requires proof of a nexus between the racketeering acts and the remedies granted. Such an absurd situation was not even before the Indiana Supreme Court, much less discussed or approved. The facts before the Court below involved proof that certain stores were connected to related and illegal sales of obscene items and these stores had assets directly related to those illegal acts.

It is inconceivable that any court would order the closure or seizure of other stores or assets not proven to be connected to the specific

offenses proven. In light of the prior decisions of this Court and the federal courts cited above, it is unreasonable to assume, even "for the sake of argument", that a court would be willing to find two sales of a magazine or two rentals of a film to permit seizure of all (or even any other) stores or their inventories or business equipment. All the stores and Defendants below were specifically connected with several specific crimes involving hard-core obscenity. In this context the Indiana courts began to fashion the due process needed to safeguard the State's rights to effective application of state law while also safeguarding against unconstitutional prior restraint. Some restraint is always required by law, and deterrence of crime is a legitimate function of even obscenity statutes. Polykoff v. Collins, 596 F.Supp. 584,

591 (D. Ariz. 1984), aff'd. 816 F.2d 1326 (9th Cir. 1987). See also: Vance, supra at 324-25 (Justice White dissenting). This is more than obvious in the modern world where obscenity offenses are not only necessary but inherent in the traffic in hard-core pornography by today's porn industry.

As this Court recognized in Russello, supra at 24-27, new weapons, broadly defined, are needed to combat this national disgrace, or else "whole areas of organized criminal activity would be placed beyond" the law. The old maxim that "the law is presumed to know what everyone knows" is embodied in the historical treatment by this Court of "hard-core pornography" as an obvious form of unprotected criminal obscenity. From Roth v. U.S., 354 U.S. 476 (1957), through Manual Enterprises v. Day, 370

U.S. 478, 489 (1962), to Miller v. California, 413 U.S. 15 (1973), this Court has used "hard-core pornography" as a shorthand term for "obscenity". Where penetration is clearly visible, such "PCV porn" is such that everyone knows it when they see it. See also: Taylor, "Pornography and the First Amendment", Criminal Justice Reform, chapter 11 (D.C.: Free Congress Research and Educational Foundation, 1983); Milligan, "Obscenity: Malum in Se or Only in Context: The Supreme Court's Long Ordeal", 7 Capitol Univ. Law Rev. 631 (1978).

In Mishkin v. New York, 383 U.S. 502, at 506-08 (1966), this Court noted that New York courts had limited their obscenity statute to reach only "hard-core pornography" and that this limitation "is more stringent than the Roth definition" and therefore "the

judgment that the constitutional criteria are satisfied is implicit in the application of" New York's statute. (Emphasis added.) See also: U.S. v. West Coast News, 357 F.2d 855, 857 (6th Cir. 1966); State v. Voshart, 159 N.W.2d 1, 6 (Wisc. 1968); Woodruff v. State, 273 A.2d 436 (Md. App. 1971); Whiting v. Roxy, Ltd., 293 N.E.2d 889, 891 (Ohio C.P. 1973); Zeitlin v. Arnebergh, 383 P.2d 152 (Cal. 1973); 5297 Pulaski Highway v. Perryville, 519 A.2d 206, 214 (Md. App. 1987). And see: Peters v. State, 449 N.E.2d 311, 312-13 (Ind. App. 1983).

The use of the "hard-core rule" gives limitation and guidance to obscenity-RICO actions (as in the cases below, 4447 Corp. and Sappenfield, and Pryba, supra) as surely as the previous obscenity decisions in Illinois gave guidance on what was known as obscene in

that state. See: Ward v. Illinois, 431 U.S. 767, at 771-73 (1977). The "vagueness" of the "Miller Test" and scienter rules, as they apply in Indiana obscenity law (See: Sappenfield Brief at 25-30, Fort Wayne Brief at 53-61) is as absurd in these cases as it was in Ward, supra, and Hamling v. U.S., 418 U.S. 87, 118-23 (1974), in light of the many Indiana obscenity cases interpreting and applying these concepts. See: Van Sant v. State, 523 N.E.2d 229 (Ind. App. 1988); Albright v. State, 501 N.E.2d 488 (Ind. App. 1986); American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd. 475 U.S. 1001 (1986); Saliba v. State, 475 N.E.2d 1181 (Ind. App. 1985); Sedelbauer v. State, 462 N.E.2d 244 (Ind. App. 1984); Richards v. State, 461 N.E.2d 744 (Ind. App. 1984); Sedelbauer v. State, 455 N.E.2d 1159 (Ind. App. 1983); Peters v. State,

supra, 449 N.E.2d 311 (Ind. App. 1983); Porter v. State, 440 N.E.2d 690 (Ind. App. 1982); Isaac v. State, 439 N.E.2d 1193 (Ind. App. 1982); McNeal v. State, 434 N.E.2d 127 (Ind. App. 1982); Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981), cert. denied 455 U.S. 1035 (1982); State, ex rel Drost v. Superior Court, 416 N.E.2d 1247 (Ind. 1981); American Films v. State, 413 N.E.2d 1091 (Ind. App. 1981); Smith v. State, 413 N.E.2d 652 (Ind. App. 1980); Beach v. State, 411 N.E.2d 363 (Ind. App. 1980); State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), appeal dismissed f.w.o.s.f.q. 446 U.S. 931 (1980); State, ex rel. J.N.S., Inc. v. Municipal Court, 396 N.E.2d 361 (Ind. 1979); Hagood v. State, 395 N.E.2d 315 (Ind. App. 1979); Ford v. State, 394 N.E.2d 250 (Ind. App. 1979); Riley v. State, 389 N.E.2d 367 (Ind. App. 1979);

Massey v. City of Mishawaka, 378 N.E.2d 14 (Ind. App. 1978).

In the face of this wealth of precedent to guide Defendants and the state courts below (See also Appendix B for state RICO cases), Petitioners must be held to their burden to show beyond a reasonable doubt that the Indiana statutes are invalid, incapable of constitutional application, and not entitled to the presumption that they are valid and will be validly enforced. The record in the instant cases shows no facial or applied invalidity that is not or cannot be construed correctly by the Indiana courts. See also: Naked City, Inc. v. Aregood, 667 F.Supp. 1246 (N.D. Ind. 1987); Moore v. Sims, supra at 429-30.

B. The Restraint Upon The Distribution Of Materials Not Adjudicated As Obscene Is

Incidental Only To Those Items Forfeited As Property Assets Of A Corrupt Enterprise And Does Not Amount To An Unconstitutional Prior Restraint Upon Other Materials Or Against The Same Or Similar Items In Commerce At Other Locations.

Petitioners, and their amicus, argue the chilling effect of RICO law on legitimate expression, yet they have offered no proof to the courts below, nor to this Court, that any actual restraint has in fact occurred. The Fort Wayne Brief, at 10, notes that the Indiana Court of Appeals granted a stay that removed the padlocks on the three stores in Fort Wayne which meant they were "allowed to resume operations". Petitioners fail to mention that all three Fort Wayne stores did re-open and one is still operating today, selling hard-core ("PCV") pornography of the type found obscene in the Indiana obscenity cases cited above and in such

cases as Hamling v. U.S., 418 U.S. 15 (1974), and U.S. v. Battista, 646 F.2d 237 (6th Cir. 1981), cert. denied 454 U.S. 1046 (1981) (Deep Throat). The stores in the Sappenfield case were never closed or restrained, the operating stores in Indianapolis were never closed or subject to seizure, and the third store which had assets seized in Indianapolis was released from its restraining order.

The burden should be on Petitioners to prove that unreasonable consequences have followed the RICO statutes, as the parties did in Dombrowski, supra. The truth is that hard-core obscenity is out of control and a major problem for law enforcement. See also: "Project: An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity", 52 New York Univ. Law Rev. 928 (1977); "The Pornography Industry",

Boston Globe series of Feb. 13-18, 1983. A question that begs itself from amicus briefs such as from the Video Software Dealers Association (VSDA) and American Booksellers Association (ABA) (See: 99 L.Ed.2d 268), is whether the ABA members desire to distribute hard-core "PCV" pornography (they don't now) and whether the VSDA video rental stores are really chilled if they continue to rent hard-core titles all across the country, as they do. The obscenity laws of Congress and the state legislatures are supposed to prevent and "chill" the traffic in obscenity, and "PCV porn" is not arguably outside that legitimate reach of those statutes.

Within the pornography industry, there are well defined classes of materials. Hard-core pornography consists of "PCV" materials of hetero-and homo-sexual acts, bondage,

sado-masochism, bestiality, etc., as well as the simulated material with genitals displayed but no penetration shown. Both actual and simulated were included as "hard-core" by this court in Manual Enterprises v. Day, supra and Miller, supra at 24-25, but the porn trades usually refer to hard-core as only "PCV" and try to include simulated ("medium core") in with "soft-core". Soft-core pornography rightfully includes only nudity and little or no sexual activity. Only so-called "adult bookstores and theatres", and now many "mom and pop" video stores, carry hard-core "PCV" pornography, whereas legitimate theater chains which show Hollywood movies do not show any "PCV". Cable services such as Playboy Channel show extensive simulated sex ("medium core"), as do many "men's sophisticate" magazines such as Penthouse and Hustler.

Hollywood movies which are rated "R" or "PG" by the Motion Picture Associtions of America (MPAA) show nudity and some brief scenes of simulated intercourse ("soft-core"), like the scenes in Carnal Knowledge, Jenkins v. Georgia, 418 U.S. 153 (1974), as well as magazines such as Playboy and Playgirl. No reported or known obscenity case has been brought under any Miller based federal or state law against any movies rated "R" or "PG" by the MPAA anywhere in the United States and all known cases have involved hard-core materials that explicitly show "PCV" or graphic simulated sex. There has been no unconstitutional chill if the only result of obscenity and RICO laws has been to keep "Hollywood" movies from forcing actors and actresses to perform actual sex acts in MPAA rated movies (which would automaticaly make them "X"). There has not been

sufficient legitimate chill if the video stores and "adult stores and theatres" continue to distribute "PCV" materials. If the effect of RICO and obscenity law enforcement is to convince or force the marketplace to remove hard-core pornography, then this would not be unreasonable under the First Amendment and would be the legitimate aim of such laws. See: Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Vance v. Amusement Co. 445 U.S. at 324 (Justice White Dissenting); New York v. P.J. Video, Inc., 475 U.S. ___, 89 L.Ed.2d 871 (1986). See also: Agreement for the Suppression of the Circulation of Obscene Publications (1910,1949), 37 Stat. 1511; Treaties in Force 209 (U.S. Dept. State, Oct. 31, 1956), cited in Roth v. U.S., 354 U.S. 476, 485, n.5 (1957). Any unconstitutional chill or prior restraint should be affirmatively

shown by Petitioners and they have failed to offer any proof that any has occurred anywhere. Petitioners really seek permission to engage in the open and notorious traffic in hard-core pornography, and want freedom from the reach of any obscenity laws, especially those which could be the most effecive such as RICO. This Court has already recognized the propriety of obscenity laws, Roth, Miller, Paris, Hamling, supra; Pope v. Illinois, 481 U.S. ___ 95 L.Ed.2d 439, 107 S.Ct. 1918 (1987), and if obscenity is subject to prohibition as a criminal act, or even a civil, quasi-criminal or nuisance violation, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Huffman v. Pursue, 420 U.S. 592 (1975); Art Theater Guild v. Ewing, 421 U.S. 923 (1975), then obscenity should be subject to RICO laws. The First Amendment is protected by the

presumption of protection accorded allegedly obscene materials in the same way criminal defendants are protected in other cases by the presumption of innocence. Once removed by proof beyond a reasonable doubt in criminal cases or by clear and convincing evidence or a preponderance in civil cases, Cooper v. Mitchell Brothers, 459 U.S. 944 (1982), all that is left is an unlawful act. If the presumption of protection were absolute, no temporary seizures on probable cause could occur prior to trial in any obscenity case. P.J. Video, supra; Heller v. New York, 413 U.S. 483 (1973); U.S. v. 12 200-Ft. Reels, 413 U.S. 500 (1973). The statutory and common law elements of proving obscenity and scienter are the due process protections to which pornographers are entitled. These are strict and complicated burdens for the

prosecution, Pope v. Illinois, supra, and total immunity from enforcement is not also warranted.

If the state can show a pattern of racketeering by obscenity offenses, and a relation to a business of assets used in or derived from this illegal pattern, then forfeiture is appropriate. The Indiana Supreme Court was correct in concluding that corruption is not based on how the corruption occurs. 4447 Corp., at 564. The Arizona Court of Appeals in State v. Feld, 745 P.2d 146, 152-56 (Ariz. App. 1987), cert. denied ___U.S.___, 99 L.Ed.2d 482 (1988), upheld the purely criminal sanctions of RICO to obscenity (such as were charged in Sappenfield herein), but felt constrained to eliminate most of the restraining and forfeiture powers except as to the exact items found obscene or the exact dollar amount of those items.

This effectively kills the power of the courts in RICO actions to punish and reform a corrupt business and its operators when caught systematically violating obscenity laws. If a person used drug or prostitution or gambling proceeds to buy and run a bookstore or grocery store, this Court should have no problem allowing forfeiture of the inventories of books and food and any other related interest in the "legitimate" business. This would not be a true prior restraint on those books seized because the government can sell them and all other businesses in the country can sell those books and even the defendants can sell those books elsewhere. Just as the injunction in Avenue Book Store v. City of Tallmadge, supra, adds effectiveness to a nuisance action, rather than enjoining only the specific items found obscene, and just

as a store can be closed for a year after being found a nuisance because its stock in trade is found obscene, State, ex rel. Kidwell v. U.S. Marketing, supra, assets of a racketeering enterprise should be subject to seizure or restraint, and forfeiture, if used to violate obscenity laws. Closure and forfeiture are penalties for corrupting a business, not a direct suppression of the specific books or films then in inventory. Any restraint goes only to those items at that store and is incidental to a proper penalty for a violation of law. Arcara v. Cloud Books, 478 U.S. ___, 92 L.Ed.2d 568, 576-78 (1986). Therefore, Arcara and P.J. Video, supra, support treating obscenity as any other predicate RICO offense and allow reasonable forfeitures of assets or closure of the corrupted business.

CONCLUSION

The Final Report of the U.S. Attorney General's Commission on Pornography (DOJ, 1986; Rutledge Hill Press, 1986), although ridiculed (and rightfully feared) by the pornographers, speaks for itself and outlines the true need for RICO in breaking up the organized crime dominated hard-core pornography syndicates. The "intractable" obscenity problem will not go away if the pornographers have anything to do with it. F.C.C. v. Pacifica Foundation, 438 U.S. 726, at 744, n.19 (1978). Now is the time to guide law enforcement in making effective use of RICO laws against the obscenity industry. Just as law enforcement in Arizona will suffer

greatly under State v. Feld, supra, the whole country will continue to suffer if the Indiana courts are reversed and the RICO laws made ineffective in this national organized crime business.

> This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale - an absolutist, "anything goes" view of the First Amendment - because it will lighten our burdens.
>
> ★ ★ ★
>
> "Our duty admits of no substitute for facing up to the tough individual problem of constitutional judgment involved in every obscenity case."
>
> Miller v. California, at 29-30.

Respectfully submitted,

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APPENDIX A

APPENDIX A

History of Three State Obscenity Law Challenges in Federal Courts

Ohio:

Sovereign News Co. v. Falke, 448 F.Supp. 306-408 (N.D. Ohio 1977) ("Sovereign I") (invalidating Ohio obscenity definition and enjoining entire statute); State v. Ronald Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978) (construing and upholding Ohio obscenity statute); Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), cert. denied, 447 U.S. 923 (1980) (remanding "Sovereign I" for reconsideration in light of State v. Burgun); Sovereign News Co. v. Falke, C77-230 (N.D. Ohio 1980) ("Sovereign II") (on remand, re-invalidating Ohio law and rejecting State v. Burgun); Turoso v. Cleveland Municipal Court, 531

F.Supp. 829 (N.D. Ohio 1980) (denying habeas corpus, one of six habeas cases where writ granted in four and denied in two); Sovereign News Co. v. Falke, 674 F.2d 484 (6th Cir. 1982), cert. denied, 459 U.S. 864 (1982) (reversing "Sovereign II" and following State v. Burgun); Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982), cert. denied, 459 U.S. 880 (1982) (reversing writs of habeas corpus and affirming denials of habeas writs and upholding Ohio statute under State v. Burgun)... (Sovereign News Co. v. Falke dismissed by District Court parties 11-30-82).

Washington:

Spokane Arcades v. Ray, 449 F.Supp. 1145 (E.D. Wash. 1978) (invalidating in toto Washington's new moral nuisance law, Initiative 335), affirmed, Spokane Arcades v. Brockett, 631 F.2d 135 (9th

Cir. 1980), affirmed summarily, Brockett v. Spokane Arcades, 454 U.S. 1022 (1981) ("Brockett I"); Spokane Arcades v. Eikenberry, 544 F.Supp. 1034 (E.D. Wash. 1982) (denying injunction against new moral nuisance statute passed to replace Initiative 335; upholding statute, and abstaining in part), reversed, J-R Distributors v. Eikenberry, 725 F.2d 482 (9th Cir. 1984) (Striking entire state obscenity statute), reversed, Brockett v. Spokance Arcades, 472 U.S. 491 (1985) ("Brockett II")... (The five suits were then dismissed.)

Texas:

Universal Amusement Co. v. Vance, 404 F.Supp. 33 (S.D. Tex. 1975) (21 federal suits throughout Texas ordered consolidated, state obscenity nuisance and search warrant statutes invalidated and all prosecutions enjoined), reversed, King Arts Universal Amusement

Co. v. Vance, 559 F.2d 1286 (5th Cir. 1978) (one of the cases, Dexter v. Butler, was affirmed), King Arts reversed on rehearing en banc, Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978) (Dexter also re-affirmed at 587 F.2d 176) (Texas nuisance statute, as yet unused, invalidated in toto), affirmed, Vance v. Universal Amusement, 445 U.S. 308 (1980). Red Bluff Drive-In v. Vance, 648 F.2d 1020 (5th Cir. 1981) (consolidated challenges to new Texas criminal obscenity statutes-District Courts denied relief-affirmed in part, abstention in part after opinion on merits of statute); Andrews v. State, 652 S.W.2d 370 (Tex. Cr. App. 1983) (construing and upholding statutes and refusing to follow advisory opinion of Red Bluff on definitions).